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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 186

OHIO TANK CAR COMPANY,

Petitioner,

vs.

KEITH RAILWAY EQUIPMENT COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT AND BRIEF IN
SUPPORT THEREOF.

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**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.**

*To the Honorable the Chief Justice and the Associate Jus-
tices of the Supreme Court of the United States:*

Petitioner, Ohio Tank Car Company, prays a writ of cer-
tiorari to review the judgment of the Circuit Court of Ap-
peals for the Seventh Circuit, entered on February 27,
1945 (R. 63).

A petition for rehearing was seasonably filed and was
denied on April 5, 1945 (R. 64).

Preliminary Statement

This is an action brought by one tank car line against
another to recover a sum of money which has been earned

as mileage allowance on certain tank cars, owned by the respondent and leased by it to the petitioner. The respondent filed a counterclaim with its answer for the amount of mileage allowance which it had paid petitioner (R. 20). The case was tried before a district judge for the Northern District of Illinois who entered a judgment, dismissing the complaint and ordering payment of the counterclaim and costs (R. 42). Appeal was taken to the Circuit Court of Appeals for the Seventh Circuit which affirmed the judgment of the District Court (R. 63).

Statement

The petitioner, a Delaware corporation, is a tank car line. It owns and operates tank cars and has its own recording marks; it also leases and operates tank cars and receives mileage allowance¹ from the railroads for the use thereof (R. 17, 29). The respondent, an Illinois corporation, is also a tank car line (R. 17).

On or about June 1, 1941, the parties executed a lease agreement (Exhibit B to the complaint) (R. 9-13) by which the respondent leased 100 of its tank cars to petitioner for one year at a stated rental. As is usual, the agreement provided for the allocation between the lessor and lessee of the mileage allowance earned by the cars which was to be collected by the lessor and credited to the lessee to the extent of the rental, and if there were then no rentals unpaid, the excess allowance should be divided according to a formula set forth in the lease (R. 10-11).

¹ Mileage allowance is the amount paid by rail carriers for the use of tank cars which are furnished to the carriers either by the owners or lessees thereof. On cars used by the railroads which are furnished by shippers, payment is governed by tariffs on file with the Interstate Commerce Commission (R. 33, Plf's. Exhibit 1). Where the cars are furnished by other railroads or, as here, by a tank car line, payment for their use is governed by rules set forth in the Railway Equipment Register (R. 33, Plf's. Exhibit 2).

Both parties performed under the lease until January 15, 1942, when respondent, in a letter signed by its then president, notified petitioner that it had reason to believe that because of "the very close hook-up or connection between" the Akin Gasoline Company and petitioner that the mileage allowance provisions of the contract violated the Elkins Act. Therefore, the letter concluded, the portion of the contract dealing with mileage allowance was cancelled effective January 1, 1942 (R. 36). To this petitioner replied, pointing out that the set-up between the Akin Gasoline Company and the Ohio Tank Car Company had been known to respondent for a number of years and "yet you have solicited our business for years." The letter concluded with a warning that litigation would ensue if the contract was not performed according to its terms by respondent (R. 34-35) and on November 10, 1943, the complaint was filed (R. 2).

The petitioner and Akin Gasoline Company (hereinafter referred to as Akin) are owned in the same proportion by the same group of stockholders, and, with minor exceptions have the same directors and officers and share the same suite of offices in Tulsa, Oklahoma (R. 23, 41). During the term of the lease petitioner loaned sums of money to Akin on open account which were subsequently repaid without interest (R. 24). There were no other transfers of funds from one company to the other and no transfers of funds representing mileage allowance from petitioner to Akin were ever made (R. 31).

Akin, an Ohio corporation, is a "marketer" of petroleum and its products which it buys from refineries and resells to customers. In carrying on its business, Akin proceeded as follows: Upon receiving an order from a customer Akin placed an order with a refinery to ship the material to the customer and gave a copy of the order to A. H. Evans who

is secretary of petitioner and traffic manager of Akin, who inserted the routing, the freight rate and a "freight differential" (usually amounting to about four cents). The refinery, pursuant to Akin's instructions, shipped the material on bills of lading supplied by Akin, preparing an original and three memorandum copies of such bills of lading, the original and two copies being sent to Akin together with an invoice. Akin in turn sent the invoice and the original and one copy of the bill of lading to the customer. The price at which Akin sold to its customers was the market price less the freight differential and it paid the refinery the market price, less the differential, less one-eighth cent per gallon (R. 24-25).

The refinery paid the freight differential and Akin's customer paid the remainder of the freight charges. Neither Akin nor petitioner paid or bore any freight charges (R. 25).

Respondent's then president who wrote the letter cancelling the mileage provisions of the lease had been calling on the secretary of petitioner since 1924, knew that the petitioner and Akin shared the same offices and that the secretary of petitioner was also the traffic manager of Akin (R. 38).

The amount of mileage allowance paid by respondent to petitioner prior to the refusal to perform further under the contract is \$4,194.69 (R. 54) and the amount due, if payment thereof is not in violation of the Elkins Act, is \$6,438.73 (R. 23).

Statutes Involved

The statute involved is the so-called Elkins Act (49 U. S. C. 41). Provisions thereof pertinent to the questions in this case are as follows:

"(1). . . . and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of

any property in interstate or foreign commerce by any common carrier subject to said chapter whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said chapter, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor."

Questions Presented

I

Are two corporations, one a marketer of petroleum products, the other a tank car line, owned in the same proportions by the same stockholders, and having, with minor differences, the same officers, directors and shareholders and sharing joint offices, one and the same corporation for the purposes of the Elkins Act?

II

Is a corporation which directs the shipment in interstate commerce of petroleum products in tank cars and issues its bill of lading therefor but does not pay the freight bill for such transportation a shipper within the meaning of the Elkins Act?

III

Are payments of mileage allowance made in accordance with the terms of a lease by one tank car line, the lessor, to another tank car line, the lessee, rebates to a shipper under the Elkins Act where the lessee is affiliated with a petroleum products marketer which has directed the movement of the leased tank cars in interstate commerce, but has not paid the freight bill?

IV

Would the repayment of mileage allowance earned on tank cars which have been paid by a lessor tank car line to a lessee tank car line affiliated with a petroleum marketer which directed the shipment of petroleum products in the said tank cars but did not pay the freight bill, place the lessee tank car line on an equal basis with shippers of petroleum products and subject to the published rates?

V

May an appellate court, reviewing a judgment based upon the finding that certain payments were rebates, rule that said payments were not rebates and yet affirm the judgment below when the sole question presented for judgment was whether or not such payments were rebates?

Reasons for Granting the Writ

This case presents questions under the Elkins Act which have never been passed upon by this Court but should be for the reason that until this litigation had been instituted and the judgments below entered the questions involved had never been presented for decision in any court. These questions, in the interest of the proper administration of justice in the federal courts and the construction of a federal statute, should be definitely settled by this court at this time when first brought to the court's attention.

The judgments below greatly extend the scope of the Elkins Act to situations never intended to be covered by it and have transmuted a simple business agreement into elaborate scheme to obtain rebates and to violate the Elkins Act. Such a strained construction of the Act should be disapproved by this court.

The Circuit Court of Appeals committed reversible error in affirming the decision of the District Court after rejecting

the decision of that court that the payments in question were rebates and then deciding that they were concessions, a contention which was never presented in the record nor in brief and argument in either court. Correction of that error can only be obtained from this court as a petition for rehearing was denied by the Circuit Court of Appeals.

WHEREFORE, it is respectfully requested that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Seventh Circuit be granted.

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H. RUSSELL BISHOP,

Counsel for Petitioner.